No. 3587

# United States

# Circuit Court of Appeals

## For the Ninth Circuit

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant in Error.

# Brief of Plaintiff in Error

**Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division**

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## STATEMENT OF CASE

All the material facts for the determination of this case are either undisputed or proven by substantial evidence. In October, 1908, the plaintiff in error, whom we will hereinafter designate as the plaintiff, secured employment with the defendant in error, whom we will hereinafter designate as defendant. As a condition preceding the employment it was necessary for the plaintiff to sign an application for employment and agree to certain rules and regulations, which when signed by the applicant, was also signed by the train master in charge of the particular division on which employment was sought. Question 21 required the applicant to agree to become a member of the Northern Pacific Beneficial Association. This requirement, when answered in the affirmative and signed by both parties, constituted, according to the conception of the plaintiff, a contract respecting the things therein referred to, to-wit: That the plaintiff will allow certain deductions from his wages or pay to the defendant, Northern Pacific Railway Company, certain sums monthly, to be fixed by the

defendant, and be deducted by or paid to the defendant, in return for which the defendant renders medical aid and attention. For the purpose of rendering such aid and attention the defendant has organized the Northern Pacific Beneficial Association and the oral testimony, (undisputed), was that the principal officers and managers of the Northern Pacific Beneficial Association are also principal officers and managers of the defendant Northern Pacific Railway Company. After signing the application and agreement as before stated the plaintiff continued in the employment of the defendant without interruption until January 1913, when he became stricken with appendicitis and was taken by the defendant to a hospital at Tacoma, Washington, operated and maintained by the defendant, through the association known as the Northern Pacific Beneficial Association, referred to in the application for employment. The result of the treatment secured in this hospital is the cause of this action. The plaintiff alleged and proved that the operation as its inception was unsuccessful in that a stump of the appendix was allowed to remain, that hernia developed, infection set in and that employees of the defendant at this hospital absolutely failed and refused to properly dress the wound as good surgery would require and by reason of the negligence and omissions, and through the acts of the defendant, its officers and employees, the plaintiff became a physical wreck, in fact, has been assigned to a living death, for which he seeks to recover the sum of $75,000.

Without further detailing the facts at this time, we will assign the error relied upon and proceed to argu-

ment. At the close of the testimony defendant moved for a direct verdict, the motion was granted and the jury was instructed to return a verdict for the defendant. (Record, p. 8). This is assigned as error. (Record p. 76).

## ARGUMENT

There is an utter lack of harmony among the various state courts involving the question of liability presented by this appeal, the defendant relying upon the case of Union Pacific Railway Company vs. Artist, decided by the 8th Circuit Court of Appeals, back in 1894, (a Wyoming case) which holds in substance although the facts therein detailed vary somewhat from the facts in this case, that a hospital maintained by a railway company, not maintained for profit, is a charitable institution and the railway company is not liable, and the logic in applying the laws of charitable institutions to the facts in that case seems to the writer very lame indeed, the elements of charity being entirely lacking. We can, however, distinguish that case from the one at bar to some extent for the reason that in the case at bar there was, as plaintiff contends, a contract for medical aid and attention fully carried out by the plaintiff, and, further the defendant in this case did not voluntarily aid in establishing the hospital in question but did establish the hospital and through its own officers and agents conduct and operate the same. We quote with approval from the decision relied upon by the defendant, at page 367:

> "If one contracts to treat a patient in a hospital —or out of it, for that matter—for any disease or injury, he undoubtedly becomes liable for any injury

suffered by the patient through the carelessness of the physicians or attendants he employs to carry out his contract. If one undertakes to treat such a patient for the purpose of making profit thereby, the law implies the contract to treat him carefully and skillfully, and holds him liable for the carelessness of the physicians and attendants he furnishes."

We submit that the element of charity as defined in that case is wholly lacking in the case at bar. We also submit that the later and better authorities in identical cases do not follow the decision relied upon by the defendant.

We make the further contention that the law and decisions of the State of Washington shall be regarded as controlling in the case at bar.

"S. 1538. (R. S. '16 721.) Laws of the States: rules of decision. The laws of the several states, except where in Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. Act Sept. 24, 1789, c 20, No. 34, 1 Stat. 92." (3 U. S. Comp. '16. Sec. 1538)

Peyton et al. vs. Desmond, 129 Federal, 1; Atlantic Coast Line Railway Co., vs. Farmer, 176 Federal, 692.

Before proceeding to argue the merits, we desire to establish further the fact that if there is evidence or reasonable inference from evidence sufficient to sustain a verdict, the trial court has no discretion in the matter,

cannot direct a verdict, but must submit the question to the jury.

"The motion for judgment notwithstanding the verdict invokes no element of discretion. It invokes the pure judicial functions of the trial court of this state on review. It can only be granted when the court can say, as a matter of law, that there is neither evidence nor reasonable inference from evidence sufficient to sustain the verdict." (76 Wash., at page 674, Brown vs. Walla Walla, 670)

We also submit as a general proposition that the motion to direct a verdict should not have prevailed:

It should be the first care of the court to preserve the right of jury trial as guaranteed by the Federal Constitution to every litigant. So withdrawing a case from the jury by instructing a verdict should never be done, unless the causes as set forth above are indisputable present. So the following rules in passing upon a motion to instruct a verdict should control the court:

First. If the plaintiff has introduced evidence bearing materially on the issues, which would be sufficient, if uncontradicted, to sustain a verdict, then no amount of contradictory evidence would justify the court in taking the case from the jury and instructing a verdict. Rockford v. Pennsylvania Co. 98 C. C. A. 105, 174 Fed. 81.

Or Second. Where the evidence is of such a character that reasonable men would differ as to the conclusions to be drawn from it. Louisville & N. R. Co. v. Roberts, 101 C. C. A. 202, 177 Fed. 923, 924 and

cases cited; Columbia Box & Lumber Co. v. Brown, 84 C. C. A. 269, 156 Fed. 459.

Third. The mere fact that there is a preponderance of evidence on one side or the other, in favor of the party moving for a verdict, does not require the judge to take the case from the jury, even though it might justify a new trial because of the preponderance of evidence against the verdict. Rockford v. Pennsylvania Co. 98 C. C. A. 105, 174 Fed 81; City & Suburban R. Co. v. Svedborg, 194 U. S. 201, 48 L. ed. 935, 24 Sup. Ct. Rep. 656; Mt. Adams & E. P. Inclined R. Co. vs. Lowery, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; Chicago, M. & St. P. R. Co. v. Anderson, 94 C. C. A. 241, 168 Fed. 901.

The specifications of negligence in plaintiffs complaint which were proven are stated in subdivision 1, paragraph 2, as follows:

"The surgeon operating upon the plaintiff failed to remove all of the infected portion of the appendix, allowing a portion of such appendix to remain." (Record p. 2)

and paragraph 3, as follows:

"That thereafter, the surgeons in the hospitals aforesaid instructed the return of the bandage with the proper dressing for attention. That thereafter the attendants furnished by the defendant, failed and refused to properly dress the said wound once for a period of three to four days, and once for a period of five days, with the result that serious infection occurred." (Record p. 3)

The plaintiff entered the services of the defendant in October, 1908, being employed by James Shannon, the train master. (Record p. 11) Contract of employment was signed by both parties and we quote question and answer No. 21..

"21. Do you understand that you are required to become a member of the Northern Pacific Beneficial Association upon entering the service of the Northern Pacific Railway, and do you assent to that Association's rules and monthly deductions from your salary for this purpose?—Yes."

"This application was made by **James Edward Carr**

(Sign your name in full, no initials.)

Located at Pasco, Washington

Date—10-26, 1908. (Record p. 14)

Witness: James Shannon."

The material portions of the plaintiff's testimony are quoted as follows:

"Mr. Johnson.—Q. After you went to work for the Northern Pacific in 1908 was anything paid by you to the Northern Pacific for medical aid and attention and surgical attention? A. It was taken out of my salary.

A. Why, I applied when I went to the hospital.

Q. Now then, when was that? A. That was in 1913.

Q. To To whom did you make application?

A. I called the doctor in.

Q. What doctor did you call in?

A. Dr. H. M. Johnson at Toppenish..

Q. What condition were you in physically when you called Dr. Johnson in? A. I was sick.

Q. Who was Dr. Johnson at Toppenish?

(Testimony of James E. Carr)

A. A Northern Pacific doctor at Toppenish.. (Record p. 15)

Q. What did he say was your ailment?

A. He said appendicitis; remove the perforated appendix.

Q. Tell the jury as near as you can, what condition you found yourself in after the operation, that is with regard to your bandages or the care that you had received immediately after the operation.

A. Well, after the operation—they made two incisions on the table, on the operating table; one was about three inches long, and then there was a smaller one lower down with. And the one above was sewed up on the table, closed and held together with tape, and they used the lower one for a drain. (Record pp. 16-17.)

Q. You say that bandage or dressing was removed in about three weeks after the operation. Who removed that bandage?

A. Why, they changed internes the first of the month, and a new interne came in and removed it, took the tape off.

Q. Was the surgeon present when the tape was removed? A. Only this interne. (Record p. 17)

Q. Just the interne? A. The interne.

Q. Do you remember his name? A. Eisengraver.

Q. What did he do after he removed the bandage, if anything?

A. Why, I asked him to leave them on and he told me it wasn't necessary.

Q. What followed after he removed the tape?

(Testimony of James E. Carr)

A. Well that night, why, I rolled around there and the side busted open.

Q. The stitches let go? A. Let go..

Q. What was the condition of your side the next morning?

A. It was blood; the dressing was saturated with blood, and clothes.

Q. Did the chief surgeon or his assistant come in and see you?

A. The assistant surgeon came in in the morning making his rounds.

Q. What was his name? A. Dr. Argue.

Q. Did he examine you then?

A. I called his attention to it and he looked at it, that is, he didn't look at the wound; just turned the clothes over; he didn't look at it at the time.

Q. He didn't look at it at that time?

A. No, just looked at the dressing.

Q. Did you complain to him about your condition?

A. I told him it was tore loose and he says I must be mistaken, and I says, "No, I don't believe I am, I think she let go last night, I am all saturated." "Oh," he says, "I guess you are mistaken." I says, "No, I ain't, look," and I turned the bed clothes back, and he could see the blood and he left there.

Q. What followed after that?

A. He and the interne Eisengraver came back in.

Q. What happened when he and the interne, Dr. Eisengraver, came back in?

A. Well, Dr. Eisengraver started to dress it and Dr.

(Testimony of James E. Carr)

Argue stood at the foot of the bed, and Dr. Eisengraver was dressing the side and Argue stood back and saw the condition I was in, and he kind of shook his head, he didn't say nothing at the time. So finally Eisengraver was just about getting through when Argue spoke to him and says, "Better put them straps back on there; they ought to leave them on." So he put the dressing on and Argue walked out.

Q. You refer to the tape that had been on there prior to that time?

A. Prior to that time, yes.

Q. Was the tape put back on?

A. There was tape put back on, but there was dressing underneath.

Q. Different from what it had been originally?

A. Different from what had been in there.

Q. What, if anything more was said by either of the doctors there at that time?

A. Well, Dr. Eisengraver says, "You hadn't ought to complain like that on me," or words to that effect. "Well," I says, "I had to do something." (Record pp. 18-19)

Q. What did he say?

A. Why, he said that I hadn't ought to have called Dr. Argue's attention to it. I told him, "I think I ought to talk to somebody," I says.

A. Well, this interne, he took care of my side there, I think for about a week, changing the dressings and stuff like that. So then one day he didn't show up at all, or the next day he didn't show up. **So the third morning**

(Testimony of James E. Carr)

**Dr. Argue came in the room, and I asked him how** often my side needed attention, and he says, "Why, about once in twenty-four hours." "Well," I says, "this is pretty near three days now, and I haven't had no dressing or attention on it." "Well," he says, "maybe it don't need it." I says, "You better look and see whether it does or not," and I turned back the bedclothes and Argue started right out of the door then, and in came the interne with some dressing under his arm. He had his street clothes on, and he came in there complaining, "You are kicking all the time; you are kicking all the time."

Q. Did Argue see the condition of your side before he went out?

A. He just saw the outside of the dressing and it was all saturated. (Record p. 20)

Q. And then the interne Eisengraver came back in, and what did he do?

A. He started to dress it, and he said I was complaining and kicking all the time. I asked him if he thought I was wrong in calling Dr. Argue's attention to this. I says, "I got to get some attention,—"

Mr. Johnson.—Q. Go ahead Mr. Carr.

A. He says, "No use kicking like that all the time; that won't get you nothing." "Well," I says, "I have got to have some attention." So he dressed it that day. He wouldn't answer me the first time—when he said I was kicking all the time I asked him—that was the second time—he says, "Maybe a little clean dressing wouldn't hurt it." So he fixed up my side and the next

(Testimony of James E. Carr)

morning he never showed up at all, nor the next morning he didn't show up. The third morning he didn't show up, and I got some dressing from the nurse to put in there, and I just tucked that underneath to soak up the stuff and puss; everything was running then, but I thought "What is the use of kicking; I am getting in awful bad?" And I wouldn't say nothing. So the next morning there was a fireman in there that was going into the dressing-room on a wheel-chair to get his attention in the dressing room, so I asked him when he came back from there, I says, "Did that doctor in there say anything about fixing me up?" He says, "Yes, he spoke about you; he has got you to take care of yet."

Mr. Johnson.—Q. Tell what took place, not what anyone not connected with the institution said. Tell what took place, what you did and what the attendants at the institution did.

A. Well, they didn't do nothing that day. That was the fourth day. And that afternoon I got into the wheel-chair that the fireman had, and I went looking for Dr. Mowers. I went down in the elevator from the third floor to the first floor and inquired of the girl in the office or lobby where Dr. Mowers was, and she said she thought he was around the building, I says, "Where is Dr. Argue?" She says, " He has gone down town." So I went around the building looking for Dr. Mowers. I didn't find him. I was in this wheel-chair all the time, wheeling myself around. So I came back to the office, and I says, "Where is Dr. Mowers, I can't find him?"

She says, "Maybe he went down town." I came out in

(Testimony of James E. Carr)
the corridor and I met Dr. Bell, and I asked him if he knew where the doctors was, and he says, "They both went down town." (Record 23) So I went back to my room. I saw there was no chance, so I went back to my room. The next morning Dr. Mowers came in and I asked him if he understood my condition. He says, "Yes." I says, "You mean to say, you understand my condition? I need some attention. **I went three days once without any dressing, and it is the fifth morning now the second time." I says, "I am laying here rotting, and I have got to have a doctor."** He says, "Do you want me, or Dr. Argue?" I says, "Either one suits me, as long as it is a doctor; I got to have some attention." So he says, "All right, I will look at your side myself this morning after I make my rounds." So I was still in the wheel chair and I wheeled out in the corridor and I met this Dr. Eisengraver, and he says to me, "Carr, as long as you are up come in the dressing-room and I will fix your side in there." And I wheeled the chair into the dressing-room myself, and he says, "Can you get up on the table?" I says, "No, I ain't going to try to get up on the table." He says, "What did you come in here for," and started getting mad. He says, "I will tell you what I think of you; you questioned my ability as a doctor." I says, "No, I never did; you are mistaken." He says, "Yes, you did." I says, "No, I didn't; you haven't given me the opportunity yet." He says, "What do you mean?" I says, "You ain't a doctor." So I went out of the room, and he went out of the room, and I met Dr. Mowers a short time afterwards and he

(Testimony of James E. Carr)

came up to me laughing, and he says, "What is the matter with you and Dr. Eisengraver?" I says, "Nothing, why?" "Oh," he says, "He just told me you stepped on his toes." I says, "That is as far as I could get in the condition I am now."

Q. How long did you remain at the hospital after that?

A. I remained up there close on to—I don't know just —close on to three months.

Q. What was the condition of the wound?

A. Oh, it kept discharging puss all the time.

Q. Was it discharging pus when you left there?

A. Yes, sir. (Record pp. 23-24)

Q. Just tell us what happened after you went home. Did you go back to work?

A. No. I called in Dr. Johnson to take care of it then. He changed the dressing every day. Sometimes I would be able to go down to the office and sometimes he would come up, and he would take care of it. Finally, he says to me, "You better go back to the hospital and get that cleared up; that ain't going to heal on you." I says, "They seem to think it is over there." He says, "It ain't going to heal up; you better go back to the hospital and see what they think of it."

A. I says, "They seem to think it isn't necessary, it is going to heal itself." Johnson says, "You go back and tell them they got to go in there." So I went back and I met Mowers and told him what Johnson says. "Oh," he says, "Now Carr, that will heal up." I was only there at the hospital about a day that time, and I came back to Johnson, and it went along the same all the

(Testimony of James E. Carr)
time after that.

Q. Where did you go from Toppenish?

A. To Pasco.

Q. Did you receive any treatment there from any company doctors (Record pp. 25-26.

A. Yes, sir; Dr. O'Brien and Dr. Driscoll.

Q. Who were they?

A. They were company doctors at Pasco.

Q. How long did Drs. O'Brien and Driscoll continue to treat you then in Pasco?

A. Oh, they have treated me off and on until 1919; well practically, O'Brien has been treating me since. (Record 26)

A. I just came from Rochester and they told me they wouldn't operate on me on account of my cough." He says, "That's funny," I says, "Yes; what's the matter with letting me stay around two or three weeks and cure up this cough, and then if you want to operate go to it?" I says, "What do you want to operate to-morrow for?" He says, "Well, I am going away tomorrow." I says, "Where are you going?" He says, "I am going to Haydon Lake." "Well," I says, "I believe I will try and get rid of this cough before I let anybody operate on me; in fact I want the fellow that operates on me to stay on the job until I am well." "Well, he says, "That's all I can do for you." He says, "That is disgusting." That is the words he says. I says, "Yes, I understand it is," I says, "It is worse than that." So he left the room and Argue fixed up my side and put the dressing on.

Q. Did you offer to stay there until you got over this

(Testimony of James E. Carr)

cough? A. I offered to stay there.

A. Oh, I think I left the next day or two after something like that.

Q. Where did you go? A. I went back to Pasco.

Q. Who treated you when you got back to Pasco?

A. I went to Drs. O'Brien and Driscoll. (Record (30-31)

Q. What is the condition of your side at this time?

A. It is discharging pus.

Q. Still discharging pus. What was your condition of health prior to this operation in 1913?

A. Considered pretty good--good. (Record 34)

Testimony of Dr. H. B. O'Brien:

Q. Dr. O'Brien, where do you live?

A. Pasco Washington.

Q. What is your business or profession?

A. Physician and surgeon.

Q. Were you ever employed by the Northern Pacific or the Northern Pacific Beneficial Association.

A. I was.

Q. And when was that? (Record 39)

Mr. Cannon.---State which one.

Mr. Johnson--Q. Which one?

A. Well both of them, I think.

Q. When were you employed by them, Doctor?

A. From about 1908, October, to about 1919.

Q. Do you know Mr. Carr? A. I do. (Record 40)

Q. Have you examined him, or were you ever present when Dr. Mower made an examination of him in your office?

(Testimony of Dr. H. B. O'Brien)

A. Why, Dr. Mowers put him up on the table and examined the side. Carr was having a great deal of trouble at that time and wanted to know what he would do.

Q. Did Mowers say anything regarding his condition at that time?

A. He said he thought the condition would clear up all right; an operation wasn't necessary.

Q. Did you ever accompany Mr. Carr to the Mayo Hospital at Rochester? A. I did. (Record 41)

Q. What treatment did Mr. Carr receive at Rochester in 1918 when you were back there with him? (Record 42)

A. Well, that is the time Dr. Judd went in and removed a stump of the appendix.

Q. Well, if someone working on the Pasco Division became sick or injured who issued the orders.

A. Generally got them from the superintendent's office if there was a wreck or anything.

Q. Superintendent of what company?

A. Of the N. P. Railway. (Record 43)

Q. As surgeon of the company did you treat any one except employees of the company?

A. Yes, if anybody was injured in a wreck as a passenger we would take care of him. (Record 44)

Q. Calling your attention now to this state of facts: Assuming that Mr. Carr has been sent by the company to Tacoma for an operation for appendicitis; an operation was performed for appendicitis and after the operation, some three weeks afterward the wound failed to heal, and it has been bandaged with adhesive tape, and that bandage was removed and a rupture occurred, pus

(Testimony of Dr. H. B. O'Brien)

was discharged and dressing applied. Doctor, how often in your opinion would it be necessary to change those dressing?s

A. It depends altogether on the amount of pus that was discharged. Of course, you dress it enough to keep it clean and dry. (Record 45)

Q. From your experience with such cases how often would you imagine that would be necessary?

A. Couple of times a day.

Q. In your opinion, would it be proper method of treatment to allow that wound to go undressed from three to five days?

A. It wouldn't be proper treatment. (Record 46)

Q. Doctor, if an operation had been performed for appendicitis and the wound failed to respond to the ordinary method of treatment and would fail to heal, what would that indicate to you as a surgeon?

A. Well, I would eventually look for some foreign substance or something that was down there to keep it from healing.

Q. In your opinion, would the failure to remove an infected portion of the appendix cause that condition?

A. It could cause it, yes. (Record 47)

Q. If an operation had been performed for appendicitis, the appendix were removed and a rupture occur red, what would be the proper method of treatment of that rupture?

A. If it was a clean wound I would wait a reasonable length of time and repair that rupture. (Record 48)

Q. What would be the result of failure to properly

(Testimony of Dr. H. B. O'Brien)

dress a wound that was discharging pus?

A. It would infect more tissue.

Q. What would be the result of that upon a man's physical condition?

A. Well, he would absorb the pus, if the dressings weren't changed, into his system.

Q. If he would absorb the pus as you have stated, how would that affect his system??

A. Well it would be a general weakened condition; weaken him physically. (Record 50)

Q. What is his present physical condition?

A. Well, he has got a hernia of that right side with a discharging sinus.

Q. Is this discharging sinus from the vicinity of the appendix? A. It is.

Q. Would such a discharging sinus be caused by the retention of an infection in this cavity in the vicinity of the appendix?

A. It would be caused from infected tissue there.

Q. At the present time can you say whether or not Mr. Carr is permanently disabled?

A. I believe he is, yes.

Q. In your opinion he is? A. Yes.

Deposition of Dr. E. S. Judd:

A. E. S. Judd, Rochester, Minnesota. Physician and surgeon.

Q. Do you know James E. Carr of Pasco, Washington, and if so, when did you first have occasion to meet him?

A. I first met J. E. Carr, 6-3-1915, I think. I recollect

(Deposition of Dr. E. S. Judd)

him, I do not know him except as a patient.

Q. Did you ever treat Mr. Carr in your capacity as a surgeon, and if so at what time or times and for what ailment? State fully as possible.

A. I operated upon him March 4, 1918 for a sinus in right iliac quadrant which was discharging pus. This sinus ran down to the ileocecal coil and old stump of the appendix. Apparently there was no definite communication with the intestinal tract at any point. This area of bowel was stitched over with plain catgut. The fistulous tract ran up behind the cecum into the muscles posteriorly, into a large pocket containing heavy granulated tissue. (Record 51)

Q. From your examination and treatment of Mr. Carr, what in your opinion was the probable cause of his condition? Please state fully and completely.

A. The discharging sinus for which we operated upon him came from the region of the appendix and may have come from retained infection in that region. It also came through the deep muscles of the back and may possibly have been tubercular in origin although no positive evidence of tuberculosis could be made out in the tissue removed at that time. (Record 52)

Testimony of Dr. J. F. Cropp:

Mr. Cannon.—I think I shall agree that he is a duly licensed physician and surgeon and is qualified.

The Court.—As an expert?

Mr. Cannon.—Yes.

The Court.—Proceed then.

Q. Dr. Cropp, do you know Mr. Carr, the plaintiff in

(Testimony of Dr. J. F. Cropp)

this case? A. I have met him once.

Q. When was that? A. Last Sunday, I think?

Q. Did you examine Mr. Carr at that time?

A. I examined him, not exhaustively.

Q. What condition did you find him in physically?

A. 'Well, I found him quite exhausted, somewhat emaciated, with what I wood denominate multiple hernia of the abdomen around near the location of the appendix. (Record 54)

Q. Assuming, Doctor, that an operation for appendicitis had been performed and adhesive tape bandage had been applied to support the abdomen and that adhesive tape and bandage had been allowed to remain for a period of three weeks this bandage was removed and a rupture occurred the night the bandage was removed and excessive pus was discharged, and it was rupture as I stated, what would be the proper approved method of treating that rupture as soon as the rupture had been discovered? (Record 55)

Q.. Now assuming the same state of facts and assuming that the wound was not stitched or sutured after it had ruptured but dressing was applied would you consider that dressing that wound in a pus case, once in three and once in five days would be proper surgical treatment?

A. I think the general law in surgery would be to keep the wound as clean as possible; taking into consideration your patient and surrounding conditions, but whether that dressing would be once a day or twice in a day or once in three or four days depends on the condition of the wound.

(Testimony of Dr. J. F. Cropp)

Q. If it was an open wound and pus was escaping so that it saturated the bed clothes and escaped around the bandage, then would a dressing from first after a period of three days and then after a period of five days be a proper treatment or should dressing have been oftener in that case?

A. The case is a criterion to go by; the point I would add it would be to keep that wound clean and free from pus as possible. I mean now the abdominal wall into which the incision had been made.

Q. After an operation for a perforated appendix had been performed, according to approved methods of surgery, would there by any stump of an appendix remaining?

A. I can't imagine a case in which the usual method of inverting had been done there would be a stump; there might be a base, we invert the stump. (Record 56-57)

Q. You examined Mr. Carr you say about Sunday, and you found him emaciated; what, in your opinion, is the cause of his present incapacity, his present condition?

A. I did not go into this case exhaustively, I did not examine his lungs, liver, kidneys, etc. I only observed the field of operation and I took for granted that the long discharge from this wound, barring any other germ infection gave rise to the exhaustion. Barring any hidden and unknown infection that might be absorbed into the system that might also give rise to this condition, the discharge from this field and the history of the case that it had been discharging for a number of years, was sufficient to cause his exhausted condition.

(Testimony of Dr. J. F. Cropp)

Q. You examined the abdominal wall as it now exists there?

A. **Found it was pretty well honey-combed.** Areas in this immediate locality in which the fascia was absent—propably had been absorbed and allowed the intestines to protrude through these openings, produced what I would denominate as multiple hernia—numerous places through which the intestines forced its way through these holes the fascia absorbed.

Q. What effect would the retention of pus and the failure to keep the wound clean after operation have upon this abdominal wall?

A. The presence of pus is an evidence of destruction and thereby absorption of the retaining wall.

Q. Would that be responsible for a condition such as you found the abdominal wall of Mr. Carr in? (Record 58)

A. I don't know that any incision had been made outside of those—externally, and I took for granted from what I found that it was through absorption—the integrity of the wall had been acted upon by pressure and absorption. I only found the condition of multiple hernia.

Q. If a cure at this time could be effected of Mr. Carr's condition, what would be required to treat that fascia of the abdominal wound there from the standpoint of surgery?

A. The first thing I would do would would make an effort to find the source from which this discharge of pus and granulating material was emanating and relieve

(Testimony of Dr. J. F. Cropp)
that by some counter drainage. If I succeeded in doing this, then I would, it seems to me, every case however is a law to itself, but just what I could see and know without further investigation, it would occur to me that probably transplantation of fascia upon this abdominal site would offer some hope of recovery, provided always the drainage, counter drainage was established so as not to produce the same condition that was produced prior. (Record 59)

Q. In any event would you wait six or seven years to do it?

A. Not with this report. (Record 61)

Testimony of John Hays:

Do you know Mr. Carr? A. I do.

Q. How long have you known him?

A. About nine or ten years.

Q. Did you know him prior to the operation he had that has been mentioned here? A. I did.

Q. What was the condition of his health before that?

A. I considered him a healthy man.

Q. About how much would he weigh?

A. I would judge probably 210 or 215 pounds. (Record 65)

Testimony of Mrs. Rice:

Q. Mrs. Rice, where do you live at the present time?

A. Pasco, Wash.

Q. What relation are you to Mr. Carr. A. His mother.

Q. What was his physical condition prior to 1913?

A. Considered in good condition always. (Record 65)

Testimony of William A. Laidlow:

Q. State your full name?

A. William A. Laidlow.

A. Secretary of the Northern Pacific Benevolent Association.

A. This report that you have offered here as Defendant's Exhibit "E", tells us that McKimberly was president. Who was Kimberly.

A. At that time he was Assistant to the President of the Northern Pacific Railway Company.

Q. It gives Geo. T. Slade as First Vice President. Who was he?

A. Second Vice-President in charge of the operation of the N. P. Ry. Co.

Q. What was W. G. Johnson at that time?

A. He was Comptroller of the N. P. Ry. Co.

Q. What profit do the employees get out of the treatment received by passengers?

A. The claim department pay at rates for attendance at that point.

Q. Do they pay the regular rates to the surgeon on the ground?

A. No, they pay it to the Benevolent Association.

Q. The surgeon does not get paid for taking care of those cases aside from his pay from the Benevolent Association? A. No.

Q. Is it or is it not a fact that all of the officers of the Northern Pacific Benevolent Association are officers of the Northern Pacific Railway Company?

A. At the time there were four of them.

Q. Who are they?

(Testimony of William A. Laidlow)

A. President, vice-president, comtroller and secretary-treasurer.

Q. For whom did you work prior to entering the service of the Northern Pacific Beneficial Association?

A. I was in the purchasing department of the N. P. Ry. Co.

Q. Assuming, now, that someone not an employee of the railway company, is injured in a wreck along the line, who takes care of that injured person?

A. The claim department.

Q. What doctor do they call?

A. Generally call the surgeon of the N. P. B. A.

Q. Then, where do they send him, if he needs hospital attention?

A. To the nearest hospital.

Q. Of the Northern Pacific Beneficial Association?

A. Any point where this man is injured he is generally taken car of and the claim department handles it. (Record 66-67-68)

Testimony of A. M. Lee:

Q. You are district claim agent of the Northern Pacific Railway Company? A. I am.

Q. How long have you been such agent?

A. Since twenty-five years.

Q. You have to do, have you, with persons who are injured as passengers or pedestrains, and also the trainmen? A. Yes.

Q. How are they treated?

A. By the N. P. authorized surgeons. We have surgeons for the Northern Pacific Beneficial Association,

(Testimony of A. M. Lee)

and they are also authorized surgeons for the Northern Pacific Railway Co. (Record 70)

Testimony of Dr. O'Brien:

Q. Did you ever treat any strangers, not employees of the Northern Pacific Railway Company during the time you were surgeon for them?

A. Yes, a number that was injured along the line.

Q. Did you receive pay from the Northern Pacific Railway Company?

A. No, don't remember of ever receiving anything for them.

A. The pay you received from the Northern Pacific Beneficial Association covered all your activities?

A. Yes, sir. (Record 71-72)

PLAINTIFF'S EXHIBIT NO. 4

MEMBERSHIP

Section 1. The membership shall include all employees of the Northern Pacific Railway Company.

MEMBERSHIP DUES

Section 1. Members whose monthly salary is less than $25.00 . . . . . $.25 per month.

Members whose monthly salary on earnings is $25.00 or over to be assessed on a basis of one (1) per cent of their monthly earnings, with a minimum deduction of 50 cents and a maximum of $3.00 monthly.

Section 8. The Treasurer of the Northern Pacific Railway shall be elected Treasurer of the Association, and shall set apart in a special fund all assessments and contributions received from officers and employees of the Railway Company; deposit same in such bank as the

Board of Managers may designate; hold, distribute and invest same under the direction of the Board of Managers.

Section 10. The Comptroller of the Northern Pacific Railway Company shall be elected Comptroller of the Association, and will audit all accounts and report to the Board of Managers at least once a year and as often as required by the Board. (Record 73)

Having reviewed the evidence, certain facts are convincingly proven, or at least sufficiently proven to become issues for the jury to determine.

First: There was a contractual relation between the parties to this suit for medical and hospital attention, the exact extent of it not being so material.

Second: The affairs of the Northern Pacific Beneficial Association were absolutely under the control of the defendant through its officers.

Third: The Northern Pacific Beneficial Association was not maintained exclusively for the benefit of the employees nor as a charity, but was maintained for the defendant, in that: it treated strangers brought to it by the claim agents of the defendant. This solely for the Benefit of the defendant, the only question being whether the Northern Pacific Beneficial Association did this for hire or at the expense of the employees. In either event, the arrangement as testified to, by the witnesses for the defense, constituted such an arrangement as would absolutely contradict the holding of the trial judge that the Northern Pacific Beneficial Association was a charitable institution.

While we have not quoted at length all of the provis-

ions and regulations of this organization, we find upon close analysis that the features are identical with the facts found in the case of Phillips vs. St. Louis & S. F. R. Co. Let us quote first from this decision:

"We have set out this evidence, perhaps, in more detail than should have been done; but the relationship between these two corporations is an important one, and not confined to this case alone. To our mind it is immaterial as to the true character of the hospital association as indicated by its charter provisions. It has, however, but few, if any, of the earmarks of a voluntary benevolent association. Nor are there any earmarks of a public charity. What is received is paid for by the recipients. Under the weight of authority it cannot be held to be a charitable institution. Haggerty vs. St. Louis, K. & N. W. R. Co. 100 Mo. App. 424, 74 S. W. 456; Coe vs. Washington Mills, 149 Mass. 543, 21 N. E. 966; Brown v. La Societe Francaise, 138 Cal. 475, 71 Pac. 516; Miller v. Chicago B. & Q. R. Co. (C. C.) 65 Fed. 305; Texas & P. Coal Co. v. Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173. So that the rule that exempts such institutions from liability, as announced in Murtaugh v. St. Louis, 44 Mo. 480, does not apply. Nor are institutions of the character of the one disclosed by the record exempted from liability by the mere employment of competent servants. They must go further and competently treat the patients received. In such case they occupy the position of ordinary physicians and surgeons and are bound by the same rules, which are too fam-

iliar for repetition here. If they undertake to furnish the treatment, not as a charity, they stand in no different light from the ordinary physician. But this question is really beside the issues in this case. No one can read this record without concluding that, if the thin corporate shell of the hospital association is broken, the yolk therein contained is the defedant. By rule 1 above quoted, defendant exempts certain mail carriers from assessment and excludes them from benefits. By rule 3, the heads of the departments and the foremen of the defendant are furnished with blank certificates, which they fill and issue to employees, entitled to receive benefits, and such heads of departments and foremen, the alter ego of defendant, thus decide who shall be treated by the hospital association. By rule 5, the defendant's chief suregon and general claim agent must be notified and, by rule 6, if the employee injured can be moved to the hospital, the chief surgeon and general claim agent must be notified. Why notify the general claim agent of defendant if the two corporations were separate and distinct entities in fact? ***** (Philips v. St. Louis & S. F. R. Co., 17 L. R. A. (N. S.) 1167 at 1175)

This case was decided in 1908 and the case upon which defendant relied was decided in 1894.

Continuing to quote from this decision, we find support for the proposition that the Northern Pacific Beneficial Association was merely the agent of the defendant in this case:

"But further showing that the hospital associa-

tion or its several surgeons, is but the alter ego of defendant, we have circular No. 35, supra, by which defendant says to all employees that they will be assessed to pay for this medical attention. No option is given the employee. By force of this rule, defendant says to an employee: "We will take so much of your monthly earnings, and in the event you are sick or hurt and in the judgment of the head of the departments and the foremen in our employ, you are entitled to medical treatment, we will furnish it to you through the hospital association." So that it becomes unnecessary in this case to break the extremely thin and attenuated corporate shell of the hospital association, and expose to open view the yolk therein contained. The hospital association, whether it in fact be a separate corporate entity or in fact the defendant itself, masquerading under an assumed name, is at least the agent and employee of the defendant to perform these particular services. The defendant pays its said agent $500 annually and in addition it requires of its employees that they pay to it the remainder, and by it such sum is paid to the agent for these services. To say the least, this hospital association, together with all its surgeons and physicians, are but agents of defendant and made so by express words in rule 13, supra. The negligence of these agents is the negligence of the defendant. As said in the case of Orcutt v. Century Bldg. Co. 201 Mo. 424, 'L. R. A. (N. S.) 929, 99 S. W. 1062, the defendant holds the purse strings of the hospital association. Not a dol-

lar does it get save through defendant. Defendant pays for itself $500, and the remainder is paid by the tribute which defendant levies upon its employees, which is collected and paid through defendant. The hospital system is a worthy one, and a well, taken, advance step; but under the record in this case, such hospital association is but the agent of the defendant.''*** (Phillips v. St. Louis & S. F. R. Co. 17 L. R. A. (N. S.) 1167 at 1175-1176)

''Under proper instructions, this cause should have been submitted to the jury, and the trial court erred in giving the peremptory instruction for the defendant.

The cause is reversed and remanded, to be proceeded with in accordance with these views.

All Concur. '' (Phillips v. St. Louis & S. F. R. Co. 17 L. R. A. (N. S.) 1178).

Coming then to the point that we are bound by the decision of our State courts we quote from the leading decision in point:

''The appellant had been in the employ of the respondent for some two and one-half years. During that time the respondent had deducted monthly from his wages certain fixed sums, based on the amount paid him, which it had retained and credited on its books to its hospital fund.*****

The only inference that can be drawn from this is that the court concluded on the second hearing that there was not sufficient evidence to justify a finding on the part of the jury that the company was conducting a hospital for the purpose of deriving a

profit therefrom, or that it had contracted to treat the injured employee for his injury. It is not authority for the broad proposition that an employer, where he maintains a hospital for profit, or contracts, for a consideration, to treat his sick and injured employees, is not liable for malpractice of the physician or surgeon he employs, nothwithstanding he exercises due care in the selection of such physician or surgeon. On the contrary, the case as a whole is authority for the opposite contention; and if in this case the respondent did contract, for a consideration, to treat its employees for any injury they might receive while in its employ, it is liable for the malpractice of the surgeon employed to treat the appellant; and this question as we say, should have been submitted to the jury.'' (Sawdey v. Spokane Falls & N. Ry. Co., 349 at pp. 351-356-357, (30 Wash. 349)

We also quote from the leading text covering this subject: Wharton & Stille's Med. Juris 3, pp. 506-507:

**''But in such case if the employer obligates himself in the contract of employment to furnish a competent and skilful physician, he is laible to employees injured by negligent treatment.''** *******

''And an employer maintaining a hospital for treatment of his employees, with moneys deducted from their salaries, who takes an injured employee to the hospital, and enters upon his treatment without informing him that his contract is limited, or claiming to be treating him gratuitously, is estopped to claim that the treatment was gratuitous, in order

to escape liability for malpractice of the physician employed.''

We are also supported by written opinions from other jurisdictions:

In Haggerty v. St. Louis, K. & N. W. R. Co. 100 Mo. App. 424, 74 S. W. 456, it was held that a railroad company could not escape liability for unskillful treatment of an employee by a surgeon employed by its relief department, upon the theory that such relief department was a charity, where employees desiring membership in the relief department had to agree that, in consideration of the amounts paid by the railroad for the maintenance of the relief department, the acceptance of benefits from said relief fund for injury or death should operate as a release and satisfaction of all claims for damages against said company. The court said: ''In our judgment the relief department organized by the defendant company, in view of the regulations provided for its government cannot be classed as a charity without doing violence to every significance that word bears either in popular or legal usage. It is not a charity within the definition of Justice Gray, above quoted, because the fund administered is not a gift by the employees who make contributions; much less by the railroad company, which does not make any unless a deficit occurs. The fund is made up from sums contributed by members for their mutual benefit and is to be enjoyed by them if they suffer from sickness or accident. It is, in effect, a provision made by the employees to insure a stipend for them

to live on if they are disabled, and a benefit to their families if they die. In addition to this, if disabled by accident, their medical attendance is paid out of the fund. This strikes us as a purely business arrangement on the part of the employees of the railroad company. **But to call the enterprise a charity on the part of the company itself is extravagant, when we note that one of its purposes, as carved in high relief on the face of the regulations, is to prevent damage suits.''**

In conclusion permit us to submit that Mr. Carr, the plaintiff, has been totally ruined and caused to suffer a living death through the negligence of the agents of the defendant, after his having contributed to their coffers for a number of years, not only to secure relief himself, but to aid them in maintaining their claim department with a direct profit to the defendant, and to call this charity and allow the defendant to escape the broad mantle of that term ''charity'' would be doing violence to established justice.

The cause should be reversed and remanded with instructions to submit the issue to a jury.

Respectfully submitted,

CHAS. W. JOHNSON,

Attorney for Plaintiff.